IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 78-1301

WALTER J. HICKEL and EDWARD A. MERDES,

Petitioners,

v.

LOWELL THOMAS, JR., PATTY ANN POLLEY, MARY JO HOBBS, JOANNE CRANE, OCTAVIA HANSEN, ANN SPIELBERG, JAY HAMMOND, CHANCY CROFT, and JALMAR KERTTULA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Lowell Thomas Jr., Patty Ann Polley, Mary Jo Hobbs, JoAnne Crane, Octavia Hansen, and Anne Spielberg, respectfully request that this Court deny the petition for writ of certiorari seeking

review of the Alaska Supreme Court's opinion in this case. 1/

QUESTIONS PRESENTED

Is the decision of the Alaska Supreme Court so arbitrary and void of support in the record and in state law that petitioners have been denied due process of law in violation of article V and the fourteenth amendment of the United States Constitution?

STATEMENT OF THE CASE

On August 22, 1978, the State of Alaska conducted a statewide primary election for nominations to numerous offices, including nominations for the federal offices of senator and representative, and for the state offices of governor, lieutenant governor and numerous seats in the Alaska Legislature. While there was certainly interest in each of the races, it was the race for

1/ The Alaska Supreme Court opinion is unreported. A copy of the opinion is appended to the Petition for Writ of Certiorari (hereinafter "Pet. for Cert".) as Appendix B.

governor which consumed the attention of virtually every citizen of the state. Because it was generally believed that the winner of the republican primary for governor would be the next governor of Alaska, it was the race in that primary which drew the most attention and more specifically, the race between the incumbent, Governor Jay Hammond, and a former governor, Wally Hickel.

Late in the evening of primary election day, unofficial reports indicated Wally Hickel was leading Governor Hammond by approximately 1,000 votes. Democratic contender Croft held a somewhat smaller lead over democratic contender Merdes. Remaining to be counted were ballots from the bush villages, absentee ballots and "questioned ballots." 2/ The vote totals at this point were not surprising for the votes from Anchorage, Mr. Hickel's

2/ AS 15.15.213. Questioning the voter's Ballot. If his polling place is in question, a voter shall be allowed to vote, and any election official shall consider the ballot as a questioned ballot.

traditional area of support, are counted by computer and the results known shortly after the polls close, while the votes from the bush villages, a traditional source of support for Governor Hammond, 3/ must be hand-counted. The hand counting of ballots, combined with the immense size of bush Alaska, with its attendant transportation and communication problems, commonly delays election results from these areas until days after voting has ended. 4/

When all the votes were finally tallied, incumbent Governor Hammond was declared the winner of the republican primary, by a margin of 98 votes, and Senator Croft the winner of the democratic primary, by approximately 270 votes.

3/ In 1974, Governor Hammond had trailed the democratic incumbent on election night but more than a week after the election, when the bush votes had finally been counted and the results communicated to the election centers, was declared the victor by a margin of approximately 237 votes.

4/ In a number of locations, the election materials are transported by dogsled and Eskimo sealskin boats.

So long as petitioner Hickel was in the lead, petitioners appeared satisfied and no complaints about the manner in which the election was run were heard. 5/ Shortly after the final results were announced, however, charges of fraud and corruption began to eminate from the petitioners' camps. In the courtroom, petitioners made no specific allegations of fraud or corruption, though they made every effort to hold that specter over the courtroom. 6/ No evidence of fraud or corruption was ever presented to the superior or supreme courts and neither court found any indication of fraud or corruption. Pet. for Cert., at Appendices A-60 and B-5.

5/ Petitioner Merdes trailed throughout the counting of ballots.

6/ At page 69 of the petition, petitioners add another participant to their conspiracy theory by stating, with the most disrespectful connotations, that the Alaska Supreme Court's decision resulted from the fact that the justices were "so satisfied with the results of the election."

Following a complete audit of the entire election, as well as a recount of all votes cast, with counsel for petitioners, respondent candidates and state officials participating in each, petitioners filed two actions in the Alaska courts. By one complaint, petitioners sought to contest the election and obtain an order directing that a new primary election be held, but only for the office of governor. 7/ By their second action, petitioners sought judicial review of decisions of the Lieutenant Governor concerning whether certain ballots had been marked in a

7/ AS 15.20.540 states in part:

> Grounds for election contest. A defeated candidate or ten qualified voters may contest the nomination or election of any person upon one or more of the following grounds:
>
> (1) Malconduct, fraud, or corruption on the part of an election official sufficient to change the results of the election. . .

lawful manner by the voter. 8/

Virtually all of the facts relevant to the election contest emanated from the post election audit 9/, and therefore the parties to the election contest were able to stipulate to most of the facts and proceed on summary judgment.

8/ AS 15.20.510 provides in part:

> A candidate or any person who requested a recount who has reason to believe an error has been made in the recount . . . involving candidates for . . . the office of governor . . . may appeal to the Supreme Court . . . The inquiry in the appeal shall extend to the question of whether or not the lieutenant governor has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate . . . the vote should be attributed. . .

9/ Petitioners did attempt to develop facts independent of the audit by publicly soliciting affidavits from citizens who thought they had observed unlawful election practices. Approximately 150 of these affidavits were presented to the superior court. Approximately one-third of these were never signed by the alleged affiant (See, Pet. for Cert., at Appendices A-9 and B-45, n. 14) and the remainder either were based upon hearsay or alleged occurrences which were not violations of Alaska's election laws.

From the outset of the litigation it was evident that irrespective of the superior court decision, the case would be appealed to the Alaska Supreme Court. Furthermore, there was need for an expeditious final resolution of the litigation because of the impending general election. Consequently, all documents filed with the superior court were simultaneously filed with the supreme court, thereby permitting the members of the court to familiarize themselves with the record at the earliest possible time.

Shortly after the conclusion of oral argument on summary judgment, the superior court rendered its decision overturning only the gubernatorial primary election. Pet. for Cert., at Appendix A. An appeal of the superior court decision was immediately filed by respondents herein. The Alaska Supreme Court heard the case on an expedited basis and, in a unanimous decision, concluded that the facts and the law necessitated the reversal of the decision of the superior court

judge. Pet. for Cert., at Appendix B.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners seek review of a federal question never raised below.

Petitioners' election contest complaints to the superior court did not specify a single federal constitutional question; the only issues raised concerned the proper interpretation of and compliance with the election laws of Alaska. As a result, the superior court's opinion is devoid of any mention of a federal issue. To the contrary, the opinion states:

> The ultimate matter to be decided in these motions for summary judgment is whether the undisputed facts, <u>when tested under the election laws of Alaska</u>, constitute malconduct on the part of election officials sufficient to change the results of the primary election held on August 22, 1978. (emphasis added)

Pet. for Cert., at Appendix A-15.

Following decision on summary judgment by the superior court, petitioners submitted statements of points on cross-appeal to the Alaska

Supreme Court. Again, petitioners made no mention of a federal issue of any sort. 10/ The first mention by petitioners of a federal issue in this litigation occurred at pages 104-107 of petitioners' opening brief to the Alaska Supreme Court. Pet. for Cert., at Appendices E-1 - 2 and D-15.

The opinion of the Alaska Supreme Court does not address the federal constitutional issues. The court's silence, however, is in accord with Alaska Appellate Rule 9(e), which provides in part:

> At the time of filing his notice of appeal, the appellant shall serve and file . . . a concise statement of the points on which he intends to rely on the appeal. The court will consider nothing but the points so stated. . . (emphasis added)

10/ At a few points in their filings with the Alaska courts, petitioners made passing mention of their "equal protection rights" and "due process rights." This Court, however, has held that such vague references are insufficient to raise a federal issue and that such references will be presumed to refer to the state constitution. New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67-68 (1928); Bowe v. Scott, 233 U.S. 658, 664-665 (1914); New York Central and H. R. Company v. New York, 186 U.S. 269, 273 (1902).

The opinion is also in accord with past decisions applying Rule 9(e). E.g., Myers v. Sill, 497 P.2d 920 (Alaska 1972); Sanuita v. Common Laborer's and Hod Carrier's Union, 402 P.2d 199 (Alaska 1965); Swick v. Seward School Board, 379 P.2d 972 (Alaska 1962).

While the opinion of the Alaska Supreme Court is silent as to the reason for not ruling on the federal question untimely raised by petitioners, this Court has repeatedly held that when

> the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the agrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969); see also, Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

Petitioners failure to properly raise before the Alaska courts the federal issues set

forth in the petition for certiorari at page 13, ¶2(j), precludes this Court, as a jurisdictional matter, from considering those issues. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 334 (Dissenting opinion) (1968).

To avoid the denial of their petition for failure to properly raise the federal issue below, petitioners attempt to gain access to this Court by asserting that the unanimous decision of the Alaska Supreme Court was so lacking of support in the record and so erroneous in its interpretation of state law that the Alaska Supreme Court itself denied petitioners their federal equal protection, privileges and immunities, and due process rights.

Though petitioners sought rehearing by the Alaska Supreme Court, their petition made no allegation that the court's decision infringed upon any of their federal constitutional rights.

See, Pet. for Cert., at Appendix D. For the reasons set forth above, this Court may not consider these issues, raised for the first time before this Court.

2. Petitioners have failed to present any issue of sufficient national importance to call for review by this Court.

Petitioners assert this case is of national significance because the effect of the Alaska Supreme Court's decision was to preclude their names from appearing on the ballot in Alaska's general election. 11/ However, it should not be the ultimate effect of the decision of the Alaska Supreme Court which determines whether a national issue is present, but rather the rulings on the underlying issues which resulted in the ultimate holding in the case.

11/ Petitioner Hickel ran in the general election as a write-in candidate.

An examination of the decisions of the Alaska superior and supreme courts reveals that every issue in the case concerned an interpretation of state law and the application of a complex and voluminous factual record to those laws. No issue of national significance was presented or decided and therefore there is no issue of national significance for this Court to review.

To bolster their "national significance" argument, petitioners allude to the alleged disenfranchisement of "a large percentage" of Alaska's population. Pet. for Cert., at page 40. This allegation is peculiar indeed for throughout the litigation of this case it has been the petitioners who have sought to disenfranchise thousands of registered voters by asserting their votes were illegal under Alaska law. See, Pet. for Cert., at Appendices B-57 - 59 and D. Respondents, on the other hand, have sought to have all votes counted, including those they knew did not favor the incumbent candidate. See, Pet. for

Cert., at Appendix A-11 - 15.

While the source of petitioners alleged belief that "a large percentage" of Alaska's population was disenfranchised is not entirely clear, we presume petitioners reference is to those allegations set forth in their brief before the Alaska Supreme Court. Pet. for Cert., at Appendix E. We turn briefly to those allegations.

(a) Cross-district and cross-precinct voting policy.

The Alaska Supreme Court concluded, 12/ and properly so, that no evidence had been presented nor findings made to support the trial courts statement that "it is fair to conclude that many thousands more" persons would have voted if they had understood cross-district and cross-precinct voting. 13/ With regard to the trial court's equally unsupported "fair" conclusion that

12/ Pet. for Cert., at Appendix B-47 - 48.

13/ Pet. for Cert., at Appendix A-93.

"hundreds of voters were turned away from the polls", 14/ the trial courts findings of fact make no mention of any evidence supporting this conclusion and, to the contrary, indicate that voters wishing to vote in a district or precinct other than their own were allowed to do so. See, Pet. for Cert., at Appendix A-25 - 32. While there was some evidence presented which indicated a few people had been turned away from a polling place and told to go vote in their own precinct or district, no evidence was presented to show they did not do so.

(b) Failure to mail absentee ballots.

Petitioners presented no evidence that contradicted the trial court's finding, adopted by the supreme court, that

> All absentee ballots were sent out no later than one day following the receipt of the application. There was no failure or refusal to mail out [absentee] ballots timely requested.

Pet. for Cert., at Appendix A-45; See also, Pet. for Cert., at Appendix A-52(7).

14/ Id.

(c) Villages of Hyder, Stony River and Lime Village.

The opinions of the trial court and the supreme court do not mention these villages for the simple reason that petitioners never mentioned them until their Petition for Rehearing to the Alaska Supreme Court. Pet. for Cert., at Appendix E-1 - 2. Not a scintilla of evidence was presented at trial in support of petitioners' allegations concerning these villages. Moreover, the superior court specifically found that "[t]here was no failure or refusal to mail out absentee ballots timely requested." Pet. for Cert., at Appendix A-45; See also, Pet. for Cert., at Appendix A-52(7).

(d) "Newly Married Maidens".

The trial court found that 14 persons attempted to vote under their married names, though they were registered under their maiden names. Pet. for Cert., at Appendix A-22; but see, Pet. for Cert., at Appendix B-82(A), indi-

cating the same suprior court, in the recount case, stated there were 20 such persons. The conclusion of the trial court and supreme court was that newly married persons wishing to vote under their new name must register under their new name at least 30 days before the election, and, further, that the law does not require election officials to ask every registered voter whether they recently have changed their name. Pet. for Cert., at Appendix A-74 and B-82 - 84. Notice of the need to reregister if recently married was given by the Alaska Voter Handbook. Pet. for Cert., at Appendix B-84.

In summary, the alleged disenfranchisement of a "large percentage" of Alaska's voters, when compared to the facts presented at trial, is reduced to 14 or 20 newly married voters who were not allowed to vote under their new name because they failed to comply with Alaska voter registration laws.

3. The Alaska Supreme Court correctly decided the properly presented issues.

Petitioners to date have not made any effort to place the factual record of this case before this Court in support of their claims. In the absence of the record, it is rather difficult for respondents to meet petitioners' repeated assertions that the record does not support various conclusions reached by the Alaska Supreme Court. Following is a brief response to those assertions of petitioners which can be addressed based upon the documents now before this Court. 15/

(a) Validation of the election.

The opinion of the Alaska Supreme Court clearly sets forth the superior court's basic error in interpreting Alaska's election contest statute, 16/ an error which led the superior court

15/ The letters correspond to those appearing in the Pet. for Cert., at pages 5 - 14.

16/ Pet. for Cert., at Appendix B-4 - 17.

to the illogical conclusion, inter alia, that while the 2,000 ballots possessed by Taylor West had not been tampered with in any way, and indeed should have been counted, those same ballots somehow tainted the election results. Pet. for Cert., at Appendices A-30 - 40, A-101 - 102, and B-17 - 21. 17/

(b) Apportioning of random illegal votes.

The apportioning of 185 18/ random invalid votes was neither "unprecedented" nor "unauthorized by . . . prior judicial decision." Indeed, the practice is common and dates back to as early as 1890. See, e.g., Grounds v. Lawe, 193 P.2d 447 (Arizona 1948); Canales v. City of

17/ With respect to these same 2,000 ballots, petitioners allege it was "improper for the Alaska Supreme Court to make a finding, contrary to that of a trial court, that 'there was no evidence that the ballots had been disturbed or tampered with during the time that they were in West's custody.'" Pet. for Cert., at page 50. Yet that was precisely the finding of the trial court. Pet. for Cert., at Appendix A-40 and A-102.

18/ Pet. for Cert., at Appendix B-91A - 91H.

Alviso, 474 P.2d 417 (Cal. 1970); Singletary v. Kelley, 51 Cal. Rptr. 682 (Cal. App. 1966); Russell v. McDowell, 23 P. 183 (Cal. 1890); Thornton v. Gardner, 195 N.E.2d 732 (Ill. 1964); Boland v. City of La Salle, 19 N.E.2d 177 (Ill. 1938); Flowers v. Kellar, 153 N.E. 351 (Ill. 1926); Choisser v. York, 71 N.E. 940 (Ill. 1904); Ollmann v. Kowalewski, 300 N.W. 183 (Wis. 1941); Hamilton v. Marshall, 282 P. 1058 (Wyo. 1930).

Had the Alaska Supreme Court merely concluded that, in an election in which the two leading contenders had received virtually an equal share of the votes, it was unlikely that out of 185 random votes, the trailing candidate would have been able to make up a margin of 98 votes, the court would have been on equally sound footing. De Martini v. Power, 262 N.E.2d 857 (N.Y. 1970); Ippolito v. Power, 241 N.E.2d 232 (N.Y. 1968); See generally, Finkelstein and Robbins, Mathematical Probability in Election Challenges, 73 Colum. L. Rev. 241 (1973).

(c) Rulings on validity of ballots.

This allegation is not sufficiently particular to permit a response.

(d) Use of official election certificates.

Assuming petitioners are referring to the use at the recount of official election certificates for two locations from which ballots had not been received 19/, Alaska's election statutes specifically state that official election certificates are valid evidence of election results. 20/

19/ Pet. for Cert., at Appendices A-32 - 36 and B-21 - 25.

20/ AS 15.15.430 states in part that "the canvass by the lieutenant governor shall include only

(1) a review and comparison of the tallies of paper ballots in the election poll books with the precinct election certificates to correct any mathematical error in the count of paper ballots,

(2) a review of the tallies of write-in ballots and a comparison of election certificates as provided by law for precincts using voting machines . . .

(footnote continues on following page)

While the actual ballots cast are certainly the best evidence of the results of an election, the superior and supreme courts agreed that the actual ballots are not the only evidence which may be used to determine election results. Other courts confronted with missing ballots but valid election certificates have also used the election certificates as conclusive evidence of the election results. Opinion of the Justices, 367 A.2d 209 (N.H. 1976); Ambrust v. Starkey, 119 N.E.2d 910 (Ill. 1954).

20/ (continued)

AS 15.15.440 states in part that . . . the lieutenant governor shall close the [state] canvass when he is satisfied that no missing precinct certificate of election would, if received, change the results of the election. If no election certificate has been received from a precinct, the lieutenant governor may secure from the election supervisors and may count a certified copy of the duplicate election certificate of the precinct. If no election poll books have been received, but an authorized election certificate has been received by telegram or radio, the lieutenant governor shall count the election certificate so received. . .

(e) Counting of the 247 ballots.

With respect to the 247 ballots found after the election, the testimony before the superior court was that "both experts concluded that the ballots probably have not been tampered with, but were unable to conclusively say that they were not tampered with." Pet. for Cert., at Appendix A-38 and A-97 - 100.

Contrary to petitioners' allegation, the Alaska Supreme Court accepted the superior court's factual findings with regard to these ballots, but concluded that the superior court had applied a burden of proof that was erroneous as a matter of law.

> While we affirm the factual findings of the superior court, we reverse its holding as to the legal standard to be applied to those findings.

Pet. for Cert., at Appendix B-27 - 28. 21/

(f) Cross-district and cross-precinct voting.

The Alaska Supreme Court did not totally ignore the "fact found by the Trial Court" that "thousands of voters" were effected by the administration of cross-precinct and cross-district voting. The supreme court considered the issue, but upon examination of the entire record of the proceeding, was unable to find any evidence to support the trial court's "fair conclusion". Pet. for Cert., at Appendix B-47 - 48.

21/ The petition for certiorari is replete with allegations which are contrary to the facts of record, the purpose of such assertions being to cast an undeserved shadow of suspicion over the primary election and the unanimous decision of the Alaska Supreme Court. One of the most glaring examples of these erroneous assertions is the claim that the "count of these [247] ballots favored respondents Hammond and Croft," leaving the impression that these ballots swung the close election in favor of the incumbent, Governor Hammond. Pet. for Cert., at p. 24. Contrary to this assertion, however, the final count of the 247 ballots favored Wally Hickel, not Governor Hammond.

The superior court specifically upheld the legality of cross-district and cross-precinct voting. Pet. for Cert., at Appendix A-78 - 85. The Alaska Supreme Court also specifically upheld the legality of cross-precinct voting. Pet. for Cert., at Appendix B-38 - 39.

Contrary to petitioners allegation that a majority of the Alaska Supreme Court found that cross-district voting was not allowed under Alaska's constitution 22/, the supreme court's opinion makes it clear that the issue was not even reached by a majority of the court, since a majority concluded that petitioners, having demanded that cross-district votes be counted, had waived any right to challenge the validity of cross-district voting. Pet. for Cert., at Appendix B-39 - 43A.

22/ Pet. for Cert., at pages 8 - 9.

(g) Waiver of right to challenge cross-district and cross-precinct ballots.

The opinion of the Alaska Supreme Court very clearly sets forth the evidence of record that supported its finding of waiver by petitioners of their right to challenge cross-district votes. See, Pet. for Cert., at Appendix B-42 - 43.

With respect to petitioners allegation that candidates' observers were not allowed to challenge the validity of absentee or questioned ballots at the state canvass, they were specifically accorded that right by the lieutenant governor, but they failed to appear at the canvass at the time they were told it would start. In a superior court case which took place prior to the end of the counting of ballots and which addressed this specific issue, the court informed petitioners that they certainly had the right to be present, but that they had no right to delay the entire state election until a time when they might find it convenient to appear for the count.

(h) Counting of absentee ballots.

The superior court properly concluded that the alleged defects in the absentee ballots did not, under Alaska law, mandate their invalidation and that, in any event, petitioners had waived their right to challenge these ballots for they had failed to challenge any such ballots at the time they were counted, despite having the opportunity to do so. Pet. for Cert., at Appendix A-106 -107. The supreme court correctly upheld the superior court's ruling. Pet. for Cert., at Appendix B-70 - 74.

(i) "Early count" of punchcard ballots.

While petitioners allege that the "early count" of punch-card computer ballots violated "a host of integrated specific statutes", unspecified herein, both the superior and supreme courts found that no statutes had been violated. Pet. for Cert., at Appendices A-58 - 59; A-112 -113; B-80 - 82.

CONCLUSION

It is evident from the above that petitioners' assertion that the Alaska Supreme Court decided this case in an arbitrary manner is at odds with the opinions of the Alaska courts, and with the record. On virtually every question of the legality under state law of various voting procedures, the superior court and supreme court agreed. The superior and supreme courts also were in agreement on virtually every issue of fact. Their fundamental difference throughout centered on the proper interpretation of Alaska's election contest statute, and petitioners have not challenged the supreme court's interpretation of that statute.

The theme which threads its way throughout the petition is that petitioners believe Alaska's election laws are in a shambles and this Court should step in and straighten them out. We respectfully suggest that, if petitioners truly

believe Alaska's election laws should be changed, the proper forum within which to air this complaint is the Alaska State Legislature, though to date petitioners have made no effort to do so.

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this _____ day of March, 1979 at Juneau, Alaska.

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By:
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